United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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FRISKIT, INC.,   No. C-03-5085 WWS (MEJ)

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                          Plaintiff,   **ORDER FOR PRODUCTION OF**
12   **SOURCE CODE**
           vs.
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REALNETWORKS, INC., and LISTEN.COM,
14
                          Defendant.
15   /
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17   As part of this litigation, defendants ("Real") have been ordered to produce to plaintiff

18   ("Friskit") source code for certain accused software products. The parties have disagreed as to what

19   source code should be produced. This Order provides a mechanism for the parties to resolve this

20   dispute.

21   The source code at issue is contained in client computer programs called RealOne Player

22   Version 1 and 2, RealPlayer Version 10.0 (and/or 10.5), RealRhapsody 2.0 and RealRhapsody 3.0 as

23   well as server programs that interact with these products such as Media Server, Messaging System,

24   Search, Rhap Server, and WebApp. The source code to be produced under this Order is that code in

25   these programs that shows the operation of functionality generally described by or similar to any

26   element in the Asserted Claims of the Asserted Patents or reasonably required to understand such

27   source code (the "Producible Source Code"). It is understood that Producible Source Code includes

28   source code that might implement an element of an Asserted Claim; it is not necessary to prove that

the source code meets all requirements of any Asserted Claim to be Producible Source Code.

The classic definition of *source code* contrasts it from object code and machine code. This definition of source code limits it to human-readable instruction sequences that must be converted into the coded numbers upon which computers operate. The advent of the World Wide Web, however, has resulted in many types of files that do not fit this definition. For example, the *lingua franca* of the web, HTML, is not compiled. Instead, it is used by a browser – such as Netscape – to direct the display of a web page. Furthermore, programs have grown so large that it may not be obvious which text files are part of a program or how they should be combined. Separate text files are required to build the program. The term source code shall mean any of the text files that are involved in the operation or building of a program or website, whether compiled, assembled, interpreted, or used as is.

The production of source code under this procedure shall not be an admission by Real that any functionality specified by Friskit actually exists in any of Real's products or that those products infringe. The failure by Real to designate any source code as not being Producible Source Code shall not be deemed as an admission that the code not so designated is admissible, relevant to this case, or is evidence of infringement. Furthermore, any failure on behalf of Friskit's Experts to identify certain particular source code is neither an admission that such source code is absent from the accused products nor an admission that the products do not infringe. This shall not preclude any party from using the source code itself in this case.

This Order anticipates that there may be some technical disagreements during the process described herein. Any such disagreements will be brought to the attention of the Neutral Expert, A. J. Nichols, who shall resolve each issue. The Neutral Expert's authority shall be limited to what source code may be requested by Friskit, what source code Real shall produce, and procedural issues related to the production and the procedures outlined in this Order.

Friskit has designated Dr. Polle Zellweger and Mike Larson as experts (collectively "Friskit's Experts") and each has signed the protective order. From 9:30 a.m. until 5:00 p.m. on a mutually agreeable date no later than April 25, 2006, Real will provide Friskit's Experts access to a portion of

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1   Real's source code for the accused products at Real's headquarters at 2601 Elliott Avenue in Seattle,

2   Washington (the "Examination"). Friskit may extend the Examination to the same time period the

3   next calendar day by notifying the Neutral Expert no later that 3:30 p.m. on the first day. The source

4   code will be made available in the form and structure in which it is normally maintained on a

5   Windows XP platform with cygwin and tools as Friskit has described to Real. Each Friskit expert

6   will be provided a computer terminal with access to the code that Friskit may reasonably request.

7   Real will also provide debug environments for RealPlayer 10.5 and RealRhapsody 3.0 to allow

8   Friskit's Experts to step through the code. Real may limit access to the code such that Friskit's

9   Experts will not be able to electronically copy or alter the code or print any portion of the code in

10 hard copy form. The purpose of the Examination is to allow Friskit's Experts to determine what

11 source code is required for later analysis and not for the detailed analysis itself.

12   Real shall have the right to identify specific portions of the source code that it believes are

13 not Producible Source Code and exclude those portions of the code from the Examination. Real

14 shall provide a list of those portions to Friskit and the Neutral Expert at least seven calendar days

15 prior to the Examination. Friskit shall have the right to challenge such designations to the Neutral

16 Expert for resolution at least three calendar days prior to the Examination.

17   Real will provide software engineers familiar with the source code and able to answer

18 technical questions about the operation of the code (collectively "Real's Engineers"). Friskit's Experts

19 shall have the right to pose technical questions about the contents and operation of the source code

20 by giving such questions to the Neutral Expert. The Neutral Expert will then question Real's

21 Engineers who will respond without unnecessary delay. The questioning and responding may be

22 written or verbal as the Neutral Expert chooses. The Neutral Expert shall then provide the answers

23 back to Friskit's Experts. Under no circumstances shall Friskit's Experts have the right to

24 communicate directly with Real's Engineers, or any other Real employee, except that written

25 materials may be transmitted to the other party via the Neutral Expert with the consent of the writer.

26 Such written materials shall not be used for any purpose in this case other than by Friskit's Experts or

27 Real's Engineers during the Examination. These written materials shall not be copied and shall be

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1   returned to the Neutral Expert upon completion of the Examination. Friskit's Experts are entitled to

2   bring to the Examination any notes they have prepared beforehand and take with them those notes as

3   well as any notes they prepare during the Examination.

4   Friskit's Experts and Real's Engineers shall have the right to talk to their respective attorneys

5   at any time. However, the attorneys shall have no *ex parte* communication with the Neutral Expert,

6   unless the Neutral Expert explicitly invites counsel for one party to engage in such communication

7   with permission from opposing counsel.

8   Before the Examination, Dr. Zellweger may identify to, discuss with, and finalize with the

9   Neutral Expert functionalities of Real's products Friskit believes are contained in the source code and

10 for which Dr. Zellweger believes in good faith may be in Producible Source Code. This list shall be

11 provided to Real at least four calendar days before the Examination. No version of this list may be

12 used as evidence during any phase of this litigation. After the list of identified functionalities is

13 finalized, the Neutral Expert shall pass the list to Real's Engineers at least four calendar days before

14 the Examination. On the calendar afternoon prior to the Examination, Real's engineers will provide

15 the Neutral Expert with general guidance as to the locations in the source code of the identified

16 functionalities, to the extent they exist[1]. The Neutral Expert will then provide this information to

17 Friskit's Experts at the Examination. This provision shall not limit Friskit's access to other portions

18 of the source code. The guidance provided by Real under this procedure shall not be an admission by

19 Real that any functionality identified by Dr. Zellweger actually exists in any of Real's products and

20 any guidance provided shall not be used for any purpose in this case other than by Friskit's Experts

21 during the Examination.

22   Real shall prepare the facility to be used by Friskit's Experts no later than the calendar

23 afternoon before the Examination. On that afternoon, the Neutral Expert may examine the facility,

24 discuss with Real's Engineers the general organization of the source code made available, review the

25 guidance information provided in the preceding paragraph with Real's Engineers, and utilize the

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27   [1]Note that specific functions such as the code to handle a mouse click are much easier to locate than broad functions such as streaming data from server to client. Broad functions may be distributed across many modules.

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1 facility to examine the source code provided by Real.

2 During the Examination, Dr. Zellweger may identify to the Neutral Expert – for example, by

3 the names of files, directories, routines, libraries, etc. – any source code she believes is Producible

4 Source Code. The Neutral Expert may disagree with Dr. Zellweger or may pass this information to

5 Real's Engineers (and may do so periodically during the Examination). Real shall have one business

6 day from the conclusion of the Examination to challenge the release of any such source code. The

7 source code not challenged shall be provided to Friskit's Experts within two business days of the end

8 of the Examination.   Source code for which the challenge is rejected shall be provided within two

9 business days of the resolution of the dispute. Any source code so produced shall be in electronic

10 form, and to the extent practicable, with the directory structure preserved and with each of the

11 accused products on separate CD-ROM sets[2].

12 For three weeks after the conclusion of the Examination, Dr. Zellweger may notify the

13 Neutral Expert of additional source code she believes is required for her analysis or challenge a

14 decision by the Neutral Expert not to ask Real to release source code. This source code shall be

15 provided under the conditions in the preceding paragraph.

16 Friskit's Experts, Real's Engineers, and the Neutral Expert shall endeavor to assure the

17 transfer of all the Producible Source Code while minimizing the transfer of code that is not

18 necessary.

19 No communications exchanged under the procedure outlined herein, including any responses

20 by Real or its engineers or employees to inquiries from Friskit's Representatives, may be used by any

21 party in support of any motion, in any expert report, at any hearing, at trial, or for any other purpose

22 in this case. This provision shall not preclude any party from using the produced source code itself

23 in this case.

24 The parties shall challenge any decision by the Neutral Expert as soon as practicable,

25 especially decisions made during the Examination. The parties may request that the attorneys be

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27 [2]In this document a CD-ROM set means a collection of one or more CDs or DVDs.

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1   heard on the issue by the Neutral Expert but the Neutral Expert may elect to hear from just Friskit's

2   Experts and Real's Engineers. A party that requests attorney participation that is denied or a party

3   that disagrees with the resolution by the Neutral Expert may raise an objection with this Court. Any

4   such issues shall be presented to this Court by a joint letter brief.

5   The party objecting to the Neutral Expert's resolution of an issue under this Order shall

6   provide its portion of a joint letter brief regarding the dispute to the other party by 11:59 p.m. Pacific

7   Time, four court days after the resolution of the dispute by the Neutral Expert. The other party shall

8   provide its portion of the letter brief by 11:59 p.m. Pacific Time, four court days after the letter brief

9   is provided by the objecting party. If to Real's counsel, letter briefs should be provided by email to at

10   least David Perlson, Evette Pennypacker, and Deepak Gupta. If to Friskit, letter briefs should be

11   provided to at least Jeff Pine and Anuj Wadhwa.

12   Additional copies need not be provided by hand service or mail and the letter brief will be

13   considered "provided" as called for this Order when sent by email to the parties listed above. The

14   specific source code at issue need not be provided while this Court resolves the dispute.

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16   **IT IS SO ORDERED.**

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18   Dated: April 4, 2006

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19   MARIA-ELENA JAMES
                                                                 United States Magistrate Judge

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